APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

August 13, 1982

Mr. Jesse J. Johnson
41 Cornelius Drive
Hampton, VA 23666

APPENDIX A

RE: Jesse J. Johnson v. Clifford Alexander, Jr., etc., et al.
A-139

Dear Mr. Johnson

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on August 13, 1982, signed an order extending your time to and including September 25, 1982.

A copy of the Chief Justice's order is enclosed.

Very truly yours,

ALEXANDER L. STEVAS,
Clerk

By

Katherine A. Downs
Assistant Clerk

Page A1

rjb
encl.
cc (letter only): The Honorable Rex E. Lee
William K. Slate, II, Esq.,
Clerk, U.S. Court of Appeals,
Fourth Circuit (your no.81-1239)

## APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. A-139 APPENDIX B

JESSE J. JOHNSON,
Petitioner,

v.

CLIFFORD ALEXANDER, JR., ETC., ET AL.

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of petitioner
IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 25, 1982.

/s/ Warren E. Burger
Chief Justice of the
United States.

Dated this 13th day of August 1982.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 81-1239

Jesse J. Johnson, Appellant,

versus

Clifford Alexander, Jr., in his official capacity as Secretary of the Army, et al, Appellees.

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O R D E R

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Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall for a panel consisting of Judge Hall, Judge Phillips and Judge Murnaghan.

For the Court,

FILED

/s/ William K. Slate, II
Clerk

May 28, 1982
U. S. Court of
Appeals, Fourth Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

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No. 81-1239

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Jesse J. Johnson, Appellant,

v

Clifford Alexander, Jr.,
in his official capacity as
Secretary of the Army;
The United States Department
of the Army, and his agents,
assigns and successors in office,

Appellees.

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Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

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Submitted: November 16, 1981 Decided:
April 20, 1982

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Before HALL, PHILLIPS and MURNAGHAN, Circuit Judges.

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Jesse J. Johnson, Appellant Pro Se.
Michael A. Rhine, Peter B. Loewenberg, and John S. Albanese, for the Appellees.

PER CURIAM: APPENDIX D (COnt)

A review of the record and the district court's opinion discloses that this appeal from that Court's order dismissing the plaintiff's complaint is without merit. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below on the reasoning of the district court. Jesse J. Johnson v Clifford L. Alexander, Jr., C/A No. 80-643-N (E. D. Va., Dec. 18, 1980).

Appendix B

IN THE UNITED STATES

COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RICHMOND, VIRGINIA

JESSE J. JOHNSON

Appellant

v Civil Action No. 81-1239

CLIFFORD C. ALEXANDER, JR.,

Defendant

AFFIDAVIT OF FREDA C. CLARK,

EXPERT WITNESS, IN SUPPORT OF

APPELLANT, JESSE J. JOHNSON

STATE OF VIRGINIA

COUNTY OF MADISON TO WIT:

Freda C. Clark, being first duly sworn, under oath states as follows:

That she is the Expert Witness in the above-captioned action, and makes this affidavit in support of appellant Jesse J.

Johnson in connection with his case.

I. BACKGROUND

1. I, Freda C. Clark, as Expert Witness in the case of Jesse J. Johnson v Clifford Alexander, Jr., (CA 81-1239), hereby submit these sworn statements:

2. I was unable to attend the second day of the trial in Mr. Johnson's case, 4 December 1980. I have carefully read the entire trial transcript, with exhibits. The following information clarifies my testimony on the first day of trial and is based on the trial record and exhibits.

3. By way of background information from 1950 to July 1977, I worked in the Office of the Secretary of the Army (OSA), the Pentagon, Washington, D. C. During the period from 1952 to July 1977, I served in the Office of Employment Policy and Grievance Review (OEPGR) as Assistant Director; Chief, Equal Employment Opportu-

nity (EEO) Branch; Deputy Director; and Acting Director, with primary responsibility for the Equal Employment Opportunity Program and the adjudication of Equal Employment Opportunity complaints. A summary of my education and experience was submitted to the Court. (Tr 189-190) Currently I work as a consultant, on a free lance basis, in the areas of EEO and Civilian Personnel Administration.

4. I have had extensive training and experience in the evaluation of employee qualifications. The thesis I prepared in satisfying the requirements for a Master of Arts Degree was entitled "Rating Employees by Means of Rating Scales." The thesis involved an in-depth study of this specific aspect of personnel administration. Prior to my employment in OSA, I had one year of experience as a psycho-matrician. I had seven years of experience in operating

personnel offices, the preponderance of which concerned selection and placement functions. During the period from 1952 to July 1977, I had primary responsibility for the review and final resolution of EEO complaints within the Department of the Army. Approximately 60 to 70 percent of EEO complaints concerned non-selection for appointment or promotion.

II. ANALYSIS

5. I carefully examined the Job Element Rating Sheets for each of the three positions in issue (D/E #1). My examination of the Rating Sheets disclosed numerous discrepancies which served to vitiate and nullify the validity and reliability of the promotion process. A careful study of the promotion processes which covered the positions in point shows that they did not satisfy regulatory and procedural requirements. Applicable Civil Service regulations require:

"Adequate promotion records...":

"To provide answers to questions that management or employees may raise about the promotion program in general or specific promotion actions." (FPM 335.6-1a)

In this connection, CIVIL SERVICE COMMISSION regulations specify that:

"An agency must maintain and have available...the following records..."

"A temporary record of each promotion made under each plan. This record is maintained for two years. It must contain sufficient information to allow reconstruction of the promotion action. At a minimum, the record must include the information below..."
(underscoring supplied)
(FPM 335.6-1b(3)

"Evaluation methods and system for combining evaluations to obtain final ratings"; and

"Evaluations of the candidates (including supervisory appraisals, test scores, etc.)"; (FPM 335.6-1b(3)(e) and (f)

Under Methods of evaluating candidates to identify best-qualified, the regulations state:

"(1) Once the appropriate evaluation criteria are identified, an agency must determine--

(a) The methods to be used to evaluate the candidates;
(b) The sequence in which the methods will be applied; and
(c) The way in which the results of these methods will be combined to determine the employee's final rating."
(FPM 335.6b(1)(a)-(c)

6. The evidence of record on the evaluation methods and system of combining evaluations to obtain final ratings and the evaluation of candidates is set forth in the Job Element Rating Sheets for Mr. Johnson and for Mr. Richard Van Deren and Ms. Francine Perry. The latter two candidates were selected for the three positions in question. (D/E #1) Job elements on which candidates were rated are listed on the left-hand side of the Rating Sheets under the heading of "Ability (As Needed for the Job)."

Section I of the Rating Sheets is designed to show how each candidate was rated on each of the listed elements on the basis of demonstrated ability by means of experience, education, performance, and awards, with a range in points from 1 to 4. Section II of the Rating Sheets provides for each candidate to be rated on potential for the job, if the employee had not yet shown ability by means of experience, education, and performance in the elements listed, with a range in points from zero to three. The design of the rating form is confusing in that it provides for total element points on both demonstrated ability and potential to be listed under Section II. The total scores should have been properly listed as separate columns.

7. The record does not contain sufficient information to allow recon-

struction of the promotion actions. Specifically, it is not possible to ascertain how the panels arrived at the final ratings of record. The rating processes were defective in that the Job Element Rating Sheets were prepared in an incomplete and inconsistent manner. The Rating Sheets do not show the points assigned by each panel member to each candidate under Section I (Demonstrated Ability) in the blocks under captions of experience, education, performance, and awards, or under Section II (Potential for the Job) in the blocks under the captions of experience, education, and performance. Therefore the requirement set forth in FPM 335.6-1b(3)(f) for records on the evaluation of candidates (including appraisals, test scores, etc.) was not satisfied.

8. The Rating Sheets show the total

point values and scores and the final ratings screening panels assigned to Mr. Johnson and to the candidates selected; however, they do not show the evaluation methods and system for combining evaluations to obtain final ratings as required by FPM 335.6-1b(3)(e).

9. The panels' records of the evaluation and rating processes are replete with ambiguous inconsistencies and discrepancies. A study of the panels' completed Rating Sheets shows that Mr. Johnson did not receive fair and equal consideration. On Vacancy Number 282-76, which listed five rating elements, Mr. Johnson received a rating of zero (of some value) under the caption of potential on four elements and a rating of 2 on one element based on demonstrated ability. He received a total score of 2 and a rating of "below 70" which was disqualifying. He was therefore elimi-

nated from further consideration (D/E #1). As a result, he was referred as a best qualified candidate and selected for promotion to a grade GS-1710-12 position.

10. The evidence does not explain the system the panel used for combining point value scores and for converting scores to a final rating as required by the aforecited regulation. Further, it does not explain why or how the panel assigned Mr. Johnson a rating of less than 70, which was disqualifying, when the sole responsibility of the panel was to select the best-qualified candidates from the group of candidates who should have previously been determined to be qualified.

11. The Rating Sheet for Vacancy Number 300-76 listed four rating elements. Under the caption of Demonstrated Ability, Mr. Johnson received a rating of 3 on one element and a rating of zero on three

elements. The panel erred in that the form did not provide for a zero rating under the caption of Demonstrated Ability (D/E #1).

12. The Rating Sheet for Vacancy Number 306-76 lists five elements. Under the final caption on Demonstrated Ability, Mr. Johnson received 3 points on one element and a zero rating on four elements. The panel again erred in assigning him a zero rating on demonstrated ability when the form did not provide for such rating (D/E #1).

13. Under the caption of potential for the job, which provides for points of zero through three on each element, the panel glaringly erred by assigning Ms. Perry 9 points on one element and 4 points on each of the four remaining elements. The panel gave her a total of 25 points when the possible total was only

15 points. Under the final caption of demonstrated ability, she received 4 points on each of the five elements which totaled 20; however, she received a total score of 18, and a final rating of 94+1. There is no explanation as to how the panel arrived at the final score of 18 or the rating of 94+1.

14. It is evident that responsible members of the Civilian Personnel Office staff failed in their obligation to assure that evaluation processes were appropriately conducted and recorded in accordance with the regulatory requirements. The regulations, in pertinent point, state:

> "Staffing specialists will serve as advisors to the raters, and assure that raters are trained in evaluation methods." (CPR 300 1-5h(3)

15. The panels were inconsistent in evaluating candidates' potential. They

treated Mr. Johnson in a disparate manner.

The panels gave Mr. Johnson either zero points or no points on potential for the jobs under Section II of the Rating Sheets. Conversely, the panel for Vacancy Number 306-76 gave Ms. Perry a total of 25 points under the caption related to potential for the job. The Rating Sheet for Vacancy Number 282-76 shows that Mr. Van Deren received a total score of 4 under the caption of potential (D/E #1).

16. Ms. Elizabeth Throckmorton, the Defendant's Witness, indicated that candidates' potential was not an appropriate factor for consideration in the positions in issue; however, she did not explain why the panels rated the candidates on the basis of potential and did not comment on the foregoing inconsistencies,

discrepancies, and ambiguities (Tr 612).

III. SELECTIVE PLACEMENT FACTOR

17. The job announcements for the positions in issue did not list, as a selective placement factor, training or experience in Instruction Systems Development (ISD). A selective placement factor is a qualification essential for successful performance in the position to be filled. Applicants who do not possess this qualification were screened out as disqualified. The evidence shows that lack of training or experience in ISD was applied in a manner tantamount to a selective placement or screen out factor. Applicants with no ISD experience, but who attended the three-week training course in ISD at Fort Lee, Virginia were generally referred as best qualified candidates.

18. The Rating Sheets for each of

the three jobs in issue list the elements on which candidates were rated. Each Rating Sheet lists an element on ability to communicate effectively in writing or in writing and orally. This is the only element on any one of the rating sheets which does not require knowledges, skills and abilities which can only be acquired by training or experience in ISD. It was not possible for a candidate without training and experience in ISD to receive a maximum score of more than 4 on any one of the three positions. Mr. Johnson's supervisor rated him Outstanding on oral and written communication; however, he received only two and three points on elements involving oral and written communication (P/E #1).

19. Testimony of panel members indicates that training or experience in ISD was considered highly essential for

successful performance in the position. (USACARO, Report of Investigation, Agreed Ex. 5): (Mr. Gaskins, Sub Ex. L. p. 5; Capt. Porthouse, Sub Ex. N pp. 4 and 5; Major Sabino, Sub Ex. M, pp. 10 and 11; Mrs. Foushee, Sub Ex. V, p. 12; Mr. H. Thompson, Sub Ex. U, p. 4; LTC H. Montgomery, Sub Ex. T, pp. 3-5.)

20. Applicable regulations state:

> "Evaluation procesures must--
>
> Distinguish carefully between the knowledges, skills, and abilities an employee must possess at the time of promotion and those he can easily and quickly acquire after promotion through experience or training. Failure to make this important distinction tends to place artificial limits on competition; it fosters inbreeding and restricts the effectiveness of manpower planning and career development by the agency." (FPM 335 3-6a(3)

21. The evidence indicates that the training courses in ISD, which most of the employees included on the referral

list had taken, were only three weeks in duration. (12-30 July 1976)

22. The regulations also indicate that it was improper to include ISD as a selective placement factor:

> "Requirement designed solely to eliminate the need for a brief period of training and adjustment (unless the period would be so long as to burden unreasonably the operations of the agency."

23. Mr. Johnson was not afforded an opportunity to attend a training course in ISD prior to the time of the selection process (Agreed Ex. 12). If referred and selected, he could have acquired this training in a brief period of time.

## IV. IMPROPER REASSIGNMENT OF MR. VAN DEREN

24. Mr. Van Deren was illegally reassigned. Effective 5 December 1976 Mr. Van Deren was promoted to the position of Educational Specialist, GS 1710-

12 (Number 282). Effective January 1977 he was reassigned from this position to that of Educational Specialist, GS 1710-12 (Number 300), a different line of work. Applicable regulations state:

> "An agency may promote an employee or reassign him to a different line of work, or to a different geographic area, and it may transfer a present employee or reinstate a former employee of the same or another agency to a higher grade or different line of work, or to a different geographical area, only after 3 months have elapsed since the employee's non-temporary competitive appointment."
> (5 CFR 330.501)

V. FAILURE OF COMPLIANCE WITH THE DEPARTMENT'S DECISION

25. Activity officials did not comply with the Department of the Army decision in Mr. Johnson's case. The decision is set forth in a letter, dated 20 October 1978, addressed to Mr. Johnson by Mr. Joseph S. Bennett, the then

Director of Equal Employment Opportunity for the Department of the Army. The decision included the following statements:

> "I have carefully reviewed and evaluated all the information in your complaint file..."
>
> "Based on my review of the information in your complaint file I find that...During my review of your complaint file, I noted that the rating and ranking process for two of the positions in question (Announcement Number 300-76 and 306-76) was accomplished by two technical advisors and one GS-9 representative of the Civilian Personnel Office. CPR 335.3-6h (2)(b) states that "...raters will occupy positions at a level no lower than that of the position being filled, and will be capable of making informed decisions regarding criteria and qualification in the occupational field." Inasmuch as the composition of the panels for these two positions was improper, I am directing that the promotion actions for these positions be reconstructed in strict compliance with governing regulations." (Agreed Ex. 13.)

Based on my experience in preparing

and reviewing letters of decision for Mr. Bennett's signature, this directive required activity officials to reprocess the promotions actions. Specifically they were to start over and to establish a new panel to evaluate, rate, and record candidate's qualifications (Tr pp. 221-222).

Evidence submitted by Defendant's counsel in Disposition Form dated 3 November 78, states:

> "Action required by para 3 of basic letter, 20 October 78, was accomplished at the time the grievance examiner reviewed the actions." (Tr Ex. D-10)

Mr. Bennett's decision in the case was based on a review and evaluation of all the information in Mr. Johnson's complaint file. Copies of the reports of the USACARO investigator and the Complaints Examiner are included in the complaint file. There is no evidence to show that the promotion actions for the

positions in question (Vacancy Numbers 300-76 and 306-76) were reconstructed after and in compliance with Mr. Bennett's decision.

## VI. UNQUALIFIED MEMBERS OF THE RANKING PANEL

26. Ms. Donna Nora Foushee, Personnel Management Specialist, GS 201-9, stated: "As a panel member, I originally got the other two panel members to meet with me in deciding the qualifications of several applicants, all of those who applied." (Report of Investigation, Agreed Ex. 5, Sub Ex. V P2). She also stated: "Each of the panel members did a rating on our own" and "there was little variance between the ratings of the three of us." (Agreed Ex. 5, Sub Ex. V, pp. 3, 5, and 8). Ms. Foushee's service on the panel was illegal in that it violated Department of the Army regulations. She was not a subject-matter specialist in

the work, the positions, and therefore was not capable of making informed decisions regarding criteria and qualifications in the occupational field. She was GS-9 grade on a ranking panel for GS-12's, in violation of CPR 335 3-6h(2)(L). The testimony of Mr. H. Thompson and LTC H. Montgomery that she did not rate or rank is pretext to cover up discriminatory violations which impacted against Mr. Johnson. Mrs. Foushee was a member of Mr. B. B. Thornton's Civilian Personnel Office staff.

27. The evidence of record does not show that LTC Horace Montgomery, Jr., who served on the panels for position vacancies 300-76 and 306-76 was a subject matter specialist or that he was capable of making informed decisions regarding criteria and qualifications in the occupational field. His background contains

no evidence of training or experience in the work involved. (Tr p. 297) He is an infantry officer. His testimony at the trial indicated that he was not knowledgeable of the work covered by the positions (Tr 297-300).

28. Thus the ranking panels of 300-76 and 306-76 had only one qualified member who was Mr. Homer Thompson, white, Educational Specialist, GS 1710-12. He knew the selectee, Mr. Richard Van Deren.

29. Ms. Elizabeth B. Throckmorton, Expert Witness for Defendant, was questioned by Defendant's Counsel regarding her relationship with me. She stated that she was familiar with me; that I worked for Mr. Bennett and that "...when Mr. Bennett's office in reviewing grievances or complaints came to the point where they were to determine the propriety of a merit promotion action or

a procedure, they send the action to my office and to me to make the determination on whether an error had occurred and what the appropriate corrective action would be."

I have no knowledge of Ms. Throckmorton's participating in the review and resolution of complaints which were decided at the OSA level.

30. In early 1972 Mr. Joseph S. Bennett was assigned to OSA in the capacity of Deputy for Civilian Personnel Policy and Director of EEO for DA. I worked under the supervision of, and served as advisor to, Mr. Bennett from early 1972 through 1 July 1977.

31. Ms. Throckmorton worked in the Office of the Director of Civilian Personnel (OCP), which was organizationally <u>located at an echelon below OSA</u>. I met Ms. Throckmorton in the spring of 1977. We were introduced by an employee

who worked under my supervision. I do not recall that I had any subsequent conversation or contact with Ms. Throckmorton until we both appeared at Mr. Johnson's trial.

32. During the period of Ms. Throckmorton's tenure in OCP, which she stated began in March 1976, (D/E 6) Mr. Bennett's office had no responsibility for the adjudication of employee grievances regarding non-selection for promotion. Employee grievances do not involve an issue of prohibited discrimination. In the early 1970's responsibility for final decision on employee grievances regarding non-selection for promotion was delegated to and vested in commanders of Major Army Commands in the United States and overseas (CPR 771). Mr. Bennett, as Director of EEO, had sole responsibility for rendering final decisions within the Department of the Army on EEO complaints.

33. As I recall, approximately three months prior to my retirement a procedure was established for referring to the Director of Civilian Personnel, for coordination, EEO complaints which required correction of personnel management deficiencies. The Director of Civilian Personnel concurred in Mr. Bennett's decision for corrective action in Mr. Johnson's case.

34. I have no knowledge of the instance Ms. Throckmorton cited in which Mr. Bennett, on her advice, revised the remedy in a case in which discrimination had been found. She cited no specific identifying information (Tr 603-604).

35. Army Regulations on EEO include the following requirements:

> "In complaints concerning non-selection for appointment or promotion, make a detailed analysis of the comparative qualifications of both complainant and the selectee(s) in

relation to the requirements for the position." (CPR 700 (C 16) 713.8-6c (1)(e), 27 June 1973)."

36. I prepared a comparative evaluation of the qualifications of Mr. Johnson and the selectees to the extent possible on the basis of inadequate records. (P/E 6) In my opinion, this comparison indicates that Mr. Johnson's qualifications, as manifested by his job-related educational achievements and military and civilian experiences, and his off-the-job speaking and writing accomplishments, equaled and exceeded the qualifications of Mr. Van Deren and Ms. Perry (Tr pp. 202-208).

Verification: I, Freda C. Clark, Expert Witness in this cause of action, declare that I have read the foregoing affidavit and know the contents of same, and state that the contents thereof are true and correct to the best of my know-

ledge, information, and belief.

Freda C. Clark

SUBSCRIBED AND SWORN TO before me, this 14th day of May 1981 in my County and State aforesaid.

My commission expires: April 1, 1985

Patricia A. Doggett
Notary Public

SEAL

2 Incl

1. DA Decoration for Meritorious Civilian Service (Freda C. Clark).
2. Transcript of Graduate Courses (Freda C. Clark).

Copy Furnished: John S. Albanese
Civilian Personnel
Litigations
Department of Army
Washington, D. C. 20310

APPENDIX F

EXTRACT FROM JOINT TRIAL (1972-1976)

In The

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

RECORD NO. 77-1656

JESSE J. JOHNSON,
Plaintiff-Appellant,

v.

ROBERT E. HAMPTON, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

BRIEF FOR APPELLANT

EXTRACT
TO LIST
A PATTERN OF DISCRIMINATION
BY THE COURT

EXTRACT

VI.

THE TRIAL COURT ABUSED ITS DISCRETION IN MANY OF ITS RULINGS

It is conceded that a determination of what constitutes judicial discretion is very difficult but in choosing which course to take, this discretion can be abused.

The Supreme Court stated that discretion must be exercised in light of the large objective of the Civil Rights Act. (Hecht v. Bowles 321, US 321, 331 (1944) (Albermarle Paper v. Moody, 422 US 405, 416) (1975).

In the instant case, to cite an example, the court ruled that appellant's expert witness, Mr. Woods, could not testify as to the many procedural and unconstitutional violations committed by the Civil Service Commission, the Army, and their agents; (T.V.I. P98, 99, 100);

however, the court allowed defendants' witnesses, Mr. D. Clos, and Mr. Oben Johnson to state their opinions as to procedures and findings of discrimination based on records not before the court; although they are not expert witnesses. (T.V.II. 289; T.V.II. 319, 320). The court also allowed Mr. Gatling, the black who was selected, to rate himself as to how qualified he is supposed to be as EEOO without verification; however, the court disregarded continuing intentional discrimination against appellant and overwhelming evidence of the qualifications of appellant.

A further example of abuse of discretion is that the court's decision to use the Brown v. G.S.A. Supreme Court decision to restrict appellant to Title VII and to January 1973 and not to use Chandler v. Roudebush to allow appellant

trial de Novo, especially in view of the fact that the four years delay between initiation of the instant action (September 1972) on the merits and actual trial in October 1976 was due in part to delaying actions by defendants. The court denied appellant trial de Novo although the same defendants were discriminating before and after the informal agreement.

In its evaluation of the evidence, the court clearly abused its discretion by making such statements as:

> "...Even had plaintiff established a prima facie case as outlined in McDonald Douglas, the court is of the opinion that plaintiff's own personnel difficulties themselves could serve to disqualify him from selection to a position requiring great powers of conciliation and compromise..."

This finding infers that, although the white defendants are the aggressive and continuing discriminators that all black

employees and appellant are at fault for this discrimination, ignoring history of nearly 400 years. The court erred in not recognizing the Army's own finding of racial discrimination involving the same defendants before and after the agreement; defendants never-ending array of unlawful discriminatory acts; the unconstitutional Civil Service complaint process; and the historic need for the 5th, 13th and 14th amendments to the constitution, Executive Orders, Civil Rights laws and various regulations to protect appellant and others from intentional discrimination. There is no evidence that appellant cannot conciliate nor compromise nor that Oben Johnson, Gatling, nor Clos can do the same. This is abuse of discretion based on assumptions. The court is penalizing appellant for defending himself against aggressive

continuing intentional discrimination. Must he suffer in silence as thousands are doing? The appellant is in court because defendants have abused discretion and authority as a cloak to cover continued racial discrimination for ten years.

The court also abused its discretion in not ruling on punitive damages and compensatory damages due to emotional distress, mental agony and racial discrimination in spite of the array of intentional discriminatorial, unconstitutional, and unlawful personnel acts of defendants for ten years, and the evidence of the expert witness, Dr. Charles F. Christian (T.V.I. P232-244)(PX 64, Psychiatric Evaluatior Report), (PX 39, P17-18), and evidence of expert witness Mr. Woods on the use of unauthorized special factors to disqualify appellant for GS-12 and unconstitutionality of

Civil Service process.

The court abused discretion when it interrupted appellant when he began to describe the racist and discriminating environment in which he had to work with defendants Lane, Lewis, Cox, and Rodriguez, Thornton, and military supervisors (T.V.I. 165, 166, 195, 196) while the court allowed defendants' witness to testify at length. (T.V.I. 282-363).

Furthermore, Mr. Clos' entire testimony was dated prior to the informal agreement (May, June 1967) and Gatling's testimony was entirely irrelevant to the issues. The primary discriminating officials (white) were not subpoenaed for a trial de Novo; however, Mr. Oben Johnson, EEOO, Gatling, EEOO, and Yuille, Director, EEOO (all black) and irrelevant to the primary issues of discrimination were subpoenaed. The

court and the administrative process shielded white defendants who discriminated under discretion by refusing to require them to testify under oath so that their demeanor could be observed.

The court rushed appellant throughout the trial to finish by 5:00 p.m. but allowed defendants time to put on evidence leisurably and tried to create the impression that the Army leans overboard to help appellant. The Army has destroyed appellant.

The court also abused discretion when it stated that the demeanor of apellant's witnesses and appellant were cause to doubt the soundness of his claim of intentional discrimination and damages. The entire administrative and court record also refutes this ruling. In fact, the demeanor of the U. S. Attorney was very intemporate in tone and was vocally

loud, abrupt, and insulting.

The appellant had no duty to prove discrimination against other blacks; this is not a class action. The tone of the decision was not impartial and was not based squarely on evidence but on assumptions and abuse of discretion.

In the U. S. Court of Appeals, Seventh Circuit, the Court did not bar appellant with Brown v. G.S.A. (U.S. of America, et al., Plaintiff-Appellant v. City of Chicago, et al., Defendants-Appellants No. 76-1113, 76-1152, 76-1205, and 76-1344 (Argued June 14, 1976) (Decided January 11, 1977), (Fed Supp. 555-540). This is a case of Black Policemen. Appellant in instant case has the same rights in court under Section 1981 as policemen have in state court as well as the Constitution and Executive orders.

Interrogatories were not properly processed by the court.

The court's summary of the facts in saying

for example, resulted in "improper treatment" instead of "discriminatory treatment"; "position had been abolished," instead of "position had been raised"; and "alleged irregularities" from February 1966, instead of "alleged irregularities and discrimination" from February 1966; and failure to mention appellant's complaint to Colonel Ben Johnson in April 1967 and the Army's finding of discrimination in November 1972 are examples of abuse of discretion by the court to slant the summary of facts in favor of the government, rather than impartiality.

The court's use of the preponderance standard of evidence required the assumption of the role of fact-weigher without hearing live testimony of white defendants nor observing their demeanor; therefore, the court abused discretion.

Discrimination is a subtle fact...if it is present anywhere in the Federal establishment, it must be promptly extinguished.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

* * * * * * * * *

APPENDIX G TO LIST APATTERN BY THE COURT

NO. 77-1656

* * * * * * * * *

JESSE J. JOHNSON, *

PLAINTIFF-APPELLANT

VS. *

ROBERT E. HAMPTON, *
ET AL.,

DEFENDANTS-APPELLEES

* * * * * * * * *

On Appeal from the United States
District Court for the
Eastern District of Virginia
Newport News Division

* * * * * * * * *

MOTION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

* * * * * * * * *

TO THE HONORABLE COURT OF APPEALS:

The facts are adequately and fully set out in Plaintiff-Appellant's brief and reply brief. Leave to file this

motion for rehearing was granted by this Court and the deadline for filing said motion was extended to January 29, 1979.

PARTICULARIZATION OF POINTS OVERLOOKED

1. Title VII should not constitute the exclusive and preemptive remedy for federal employees under the facts of this cause.

2. The district court's finding that appellant was not discriminated against in hiring is clearly erroneous.

3. The failure of the district court to grant injunctive relief is clearly erroneous.

ARGUMENT

The trial court relied upon the holding of Brown v. General Services Administration, 425 U.S. 820 (1976) in deciding that Title VII of the Civil Rights Act of 1964, as amended, provides the exclusive and preemptive remedy for

federal employees alleging job discrimination.

Brown, supra, should be restricted in its holding to apply only when the federal employee has untimely filed charges of discrimination and should not be determinative of the range or substance of remedies when the charge has been timely filed.

The factual basis of appellant's claim distinguishes his claim from the holding of Brown. Appellant timely filed his charge of discrimination and exhausted all administrative remedies prior to filing suit. Appellant has alleged that he has been subjected to systemic racial and/or sexual discrimination from his original application for employment at Ft. Eustis through trial. Appellant alleges that supervisors and officials of Ft. Eustis have conspired to

deprive him of his civil rights in violation of 42 U.S.C. Section 1985 and that such officials continue to conspire to deprive appellant of his civil rights.

Appellant produced evidence of the psychic injury he has sustained as a result of discriminatory treatment. Damages for psychic injury are not recoverable under Title VII, so by restricting jurisdiction to Title VII, appellant is deprived of the range of remedies available to a private employee.

Limiting the range of remedies is incongruous with the purpose and intent of Congress in expanding Title VII to include federal employment as reflected in the legislative history set out in pages 11-15 of appellant's reply brief.

II.

The greatest obstacle facing appellant is the clearly erroneous standard. This is a standard created by Rule 52 of

the Federal Rules of Civil Procedure.

Justice Reed in United States v. United States Gypsum, 10, 33 U.S. 364, (1944) discusses the clearly erroneous standard with the following comments:

> That rule (Rule 52) prescribes that findings of fact in actions tried without a jury shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.... The findings were never conclusive however. A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Appellant submits that in light of the undisputed testimony of the history of discriminatory treatment including the unlawful separation, illegal reduction-in-force, the violation of the informal agreement, the testimony of witnesses regarding systematic discrimination against black employees at Fort

Eustis and Fort Monroe, and the intellectual segregation of appellant by caucasian co-workers; the finding that the failure to even consider appellant minimally qualified when other federal installations around the country found appellant highly qualified, should leave the definite impression that a mistake has been committed.

The trial court failed to even consider the evidence of appellant's application for the first opening as Equal Employment Opportunity Officer at Ft. Monroe and confined its analysis to the second application for employment when Mr. Gatling, a black naval officer, was employed. Whether or not the trial court found plaintiff's expert witness credible with regard to appellant's qualifications is immaterial since the preponderance of testimony established that appellant made out a prima facie

showing of discrimination with regard to the first opening as EEO officer which was not rebutted by the government as required by McDonnell-Douglass Corp. v. Green, 411 U.S. 792 (1973).

III.

The failure of the trial court to grant any injunctive relief is particularly perplexing in light of the Court's finding that appellant has been mistreated and subjected to abuse by co-employees and supervisors. The trial court found that appellant's troubles stem from personality differences rather than racial or sexual bias, and abuse of Court discretion.

Justice Marshall, dissenting in University of California Regents v. Bakke, 57 L.Ed. 750 (1978) eloquently sets out the deplorable history of institutional racism in the United States. Of particu-

lar interest herein is the following description:

> The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units. It was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here...
>
> The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort as achievement, meaningful equality remains a distant dream for the Negro...
>
> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the main stream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

Appellant is one of those

individuals who is attempting to bring "the Negro into the mainstream of American lives." He is the product of a segregated society: appellant attended racially segregated schools, and served his country in a racially segregated military unit. Yet appellant has devoted his life since retirement toward the goal of integration. He has with pride authored numerous books on the role of Black soldiers in American history. But appellant's personal struggle for dignity and respect seems at times to be insurmountable because of the depth and intensity of the racial bigotry he faces continuously on the job. Appellant has been required since his original application for employment at Ft. Eustis to devote most of his leisure time to challenging adverse personnel actions in an attempt to secure equality.

Thus, in light of the uncontradicted

evidence set out in Argument II, the finding that the intellectual isolation of appellant from his co-workers is not an unlawful employment practice to be remedied by injunctive relief is clearly erroneous.

There is no doubt that segregating whites and Negroes in separate departments, or subjecting Black employees to disparate treatment in terms of wages, constitutes unlawful employment practices.

By isolating appellant from intellectual exchange with other writers and supervisors, appellant is subjected to disparate conditions of work.

Cutting appellant off from social and intellectual exchange promotes distrust, creates hatred and thwarps the intellectual development of not only the appellant, but his caucasian co-workers

and is reverse segregation behind separate walls in an integrated office. This is in violation of the U. S. constitution and the U. S. Supreme Court decisions.

The entire history of appellant's struggle for equality at Ft. Eustis and at Ft. Monroe, Virginia renders the findind of no discrimination as clearly erroneous and in violation of the U. S. Constitution.

Wherefore appellant prays that this motion for rehearing and suggestion of rehearing en banc be granted and that the judgement of the district court be reversed for a new trial.

Respectfully submitted

JESSE J. JOHNSON
Plaintiff-Appellant

JESSE J. JOHNSON
Pro se

## CERTIFICATE OF SERVICE

I, Jesse J. Johnson, hereby certify that a true and correct copy of the foregoing has been deposited in the U. S. mail, postage prepaid on the 29th day of January 1979 to Mr. Roger T. Williams, P. O. Box 60, Norfolk, Virginia 23501.

JESSE J. JOHNSON
Pro se

APPENDIX H

COPY

CA 80-643-N

DEPARTMENT OF THE ARMY

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON, D.C. 20310

(Received September 22, 1980
Clerk U.S. District Court
Norfolk, Virginia)

Recd. September 24, 1980
Clerk U.S. District Court
Newport News, VA 19 Sep 1980
OK Meg 9-23-80

Mr. Michael Ginn
United States District Court
Post Office Building
Granby Street
Norfolk, VA 23502

This is to confirm the arrangements you made with Captain John S. Albanese, of this office, to reschedule the date of the hearing of the above-captioned case to December 2, 1980. Thank you for your help in this matter.

Sincerely,

s/
PETER B. LOWENBERG
Chief, Civilian Personnel, Litigation

cf
John M. Cloud, Esquire, 214, Executive Building
JANAF Shopping Center
Norfolk, VA 23502

A60s

APPENDIX I
COPY

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

23 October 1980
202-697-7956

DAJA-LTC

SUBJECT: Johnson v Alexander
Civil Action No. 80-643-N

Mr. Farley Power, Jr.
Clerk, U.S. District Court
Eastern District of Virginia
Norfolk Division
Norfolk, VA 23501

Dear Mr. Power:

At the pre-trial conference held in the above captioned case on Friday, October 17, 1980, I presented the enclosed motion for Extension of Time to Judge Kellam. I am forwarding this copy to you so that your files may be complete and to insure proper filing.

PETER B. LOWENBERG
Chief, Civ. Personnel
s/ Litigation
by John S. Albanese
Captain JAG C
Civilian Personnel Litigation

APPENDIX J

COPY

TO: CLERK, NORFOLK

RE: CIVIL ACTION NO. 80-643-N

JOHNSON
v
ALEXANDER et al

HEARING SET on October 31, 1980 at 3:30 p. m.

Discovery problems notified for __
plaintiff by Meg to John M. Cloud
(Johnson)
For Defendant (By Meg to Mr. Reine
(Lowenberg)
By Meg
Date 10-17-80

APPENDIX K
COPY

c/a 80-643-N

TO: CLERK NORFOLK
RE: CIVIL ACTION 80-40NN (has since been transferred to Norfolk)

JESSE J. JOHNSON
v
ALEXANDER et al

Hearing cancelled on November 6, 1980 (no jury) at 10:00 a. m.

Hearing reset on December 2, 1980, 10:00 a. m.

Trial date continued to accommodate honeymoon of P. Lowenberg. Okay

Per Judge Clarke agreement of J. Cloud Other dates remain unchanged.

NOTOFIED: For plaintiff (by Lowenberg to J. Cloud)

For defendant (by Meg to Lowenberg) by Meg.

Date 9-18-80

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NOFROLK DIVISION

JESSE J. JOHNSON,

Plaintiff,

v. CIVIL ACTION

CLIFFORD L. ALEXANDER, JR., NO. 80-643-N

Defendant.

OPINION AND ORDER

In his complaint filed herein Jesse J. Johnson alleges "discrimination in that he was rated 'qualified' rather than 'highly qualified' or 'best qualified' on plaintiff's application for Education Specialist (GS-1710-12)." Complaint ¶ 7a. He says that as a result of his rating he was not chosen for the position of a GS-12.

I.

Many facts are stipulated, including

Plaintiff is a black male who retired from the United States Army in the grade of Lieutenant Colonel sometime about 1966. He was employed in a civilian capacity from about July 1967 until July 1980 at Fort Eustis, Virginia. In January 1973, he was reinstated to his former Civil Service position pursuant to a complaint filed. He has filed several complaints of discrimination. As of October 1976, he had 20 years Army service and 9 years in Civil Service.

Sometime in 1976, he made application for promotion to Education Specialist GS-1710-12. Three GS-12 positions were advertised, namely, 282-76, 300-76 and 306-76. Other applicants included Richard Van Deren (white) and Francine Perry (black female). One element of the job rating criteria for said positions was Instruction Systems Development (ISD), used as an element for applicants

to be classified best qualified for the positions in question. Until the promotion of Francine Perry, no black had previously been promoted to the position of Education Specialist GS-1710-12 at Fort Eustis.

II.

In brief, plaintiff asserts as grounds for relief his contention he was the one best qualified for the positions in question, and that he was not given the rating of highly qualified or best qualified because of his race. To support such contentions he says that the panels chosen to rate or rank the applicants were improperly constituted, that blacks had not been chosen to attend the ISD courses, and so on.

Although plaintiff alleged discrimination against him because of race and sex, at trial he advised he wished to

drop the sex discrimination charge. One applicant chosen over plaintiff was a white male; the other a black female. Each of them were rated as better qualified than plaintiff. The question then posed is whether there was any act of discrimination in the selection of the rating panels or in the action of the rating panels, or the selecting officer. Whether plaintiff agrees or not, once the list has been prepared showing one candidate qualified and the others highly qualified or best qualified, one could hardly suggest that discrimination occurred because the ones highly qualified or best qualified were chosen over the one rated only qualified.

III.

Plaintiff has the duty to make out a prima facie case before defendant is required to counter with evidence of a legitimate or non-discriminatory reason

for the action taken. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802, 93 S,Ct. 1817, 1824 (1973); Furnco Construction Corporation v. Waters, 438 U.S. 567, 98 S.Ct. 2943 (1978). The burden which may be shifted to defendant "is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race" and to "dispel the adverse inference from a prima facie showing under McDonnell Douglas, the employer need only 'articulate some legitimate reason for the employee's rejection.' 411 U.S. at 892." Furnco Construction Corporation v. Waters, supra. Not only must a plaintiff, complaining as does the plaintiff here, show that he sought the position, but "that the applicant was qualified to fill the position, having such skills... as were necessary for performance of the

work...." Hill v. Western Electric Co., Inc., 596 F.2d 99, 104 (4th Cir. 1979). Any "Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866 (1977). In footnote 44, explaining the above quotation, the Court said-

> An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based.

IV.

Plaintiff takes a shotgun approach in this case. He testified he experienced discrimination on a daily basis in his office and in the performance of his duties. He said that after he was promoted from a GS-07 to Educational

Specialist GS-1710-11, that he was expected to do his writing without assistance. He said there was discrimination because he was not given assistance with his writing after his promotion, however, it is clear from the evidence that a person in such a grade could not expect assistance. He said he was discriminated against because the white writers did not discuss their writing with him; that blacks were referred to as grinning hyenas; that persons talked of inferiority of blacks; that some of the supervisors or writers were hesitant to cooperate with him; and that one of the supervisors refused to discuss his writings with him. As to the last assertion, he said that the supervisor suggested he take a training course which was being offered, but he did not do so. He complained that Oben Johnson, the black EEO Officer, was one of the

persons who discriminated against him and who tried to block him from reinstatement to his former position; that other black supervisors discriminated against him, including General Small[1] and black females. In fact, he said everyone discriminated against him, blacks and all. He said he had applied for 15 or 20 jobs at Fort Eustis and that he had in fact filed some 16 complaints against the Army.

Among his claims is that the ranking panel for the vacancy number 300-76, Education Specialist GS-1710-12, of September 1976, was improperly constituted. It is not contested that a person of a lower grade may not be a member of a rating panel for a position of a



[1]One of the exhibits was a statement written by plaintiff in which he said General Small had been very fair in regard to his evaluation.

higher grade. Plaintiff says Mrs. Donna Foushee, GS-9, served as a ranking panel member to fill the vacancy for the GS-12 position. However, it is clear Donna Foushee did not do rating on this panel or vote. Homer Thompson (white) and Horace Montgomery (black), who were panel members, testified that they had no recollection of Donna Foushee's doing anything except handling the papers; that her job was to advise them. Thompson and Montgomery each said they did not know plaintiff, or his race, at time of their rating of him, and that the grading was based entirely on the information at hand and the criteria to be used in rating. Montgomery, a former Lieutenant Colonel in the Army, said the rating panel worked two of three days on the ratings; that they went through the information furnished and matched up the information with the criteria, and that he and

Thompson gave the same ratings. Montgomery testified that from a review of plaintiff's file and information, plaintiff did not have the qualifications, and that he asked why Johnson's application was there, because it was clear he did not have the qualifications. He was corroborated by the testimony of Thompson, who said that no statement or discussion of race took place during the rating; and that Donna Foushee was there to advise them on their duties.

On an appeal to the Army, the Army raised the issue that Donna Foushee was not a qualified member of the panel because she was not a Grade 12, and that a procedural error had occurred as Donna Foushee should not have been named to the panel. It found no discrimination, but directed the panel be reconstituted. This was done. Upon review, it was

found that while the procedural error occurred of having Foushee on the panel, the remaining two constituted a proper panel,[2] and nothing had been done which affected Johnson. Oben Johnson, the EEO Officer, agreed this was proper and correct.

Richard Van Deren was the selectee for the position. Lieutenant Colonel Hannum was the one responsible for selecting Van Deren from the list. Because of his rating, Johnson was not on the list. After interviewing all on the list, Hannum determined Van Deren and Francine Perry were the best qualified persons and selected them. A comparison of the qualifications clearly demonstrates that Van Deren was much better qualified than plaintiff. He had an undergraduate



[2]Regulations do not prescribe how many shall be placed on a panel.

degree in English and had taught English some five years. He returned to graduate school on a fellowship to study Educational Administration and obtained his master's degree and thereafter a Ph.D in Educational Administration at Virginia Intermont, where he was responsible for Planning and Design of Planning from 1970 to 1975. From there he went to Engineering School at Fort Belvoir, where he did Research and Instructional Systems for about eleven months. He developed the plan for Training Management Institute to modernize training and was project officer to assist schools in modernizing training programs. He was at a GS-11 grade.

While it is not feasible or necessary to deal with each of plaintiff's complaints, some of them call for comment.

1. He complained everyone discriminated against him, including Oben Johnson, the EEO Officer. Johnson complained the EEO Officer would not process his complaints and did nothing for him. The evidence is to the contrary. The EEO Officer said it was his duty to try to resolve any complaint made; that if it could be done through the supervisor, it should be done that way; that some of the complaints made by Johnson were handled this way; that some of Johnson's complaints were entirely without merit, or not timely filed, or did not comply with regulations and he refused to file them.

2. Johnson complained of lack of training, and he recommended it be given him; that a selection of courses was formulated so that Johnson could attend, but Johnson refused saying it would be

an indication he was not qualified.

3. The EEO Officer said that Johnson complained that it had been more than a year since he had had a performance rating, and when it was made available, Johnson objected to it as not enough time to evaluate him.

4. The EEO Officer said that Johnson complained of the location of his desk in the working office where he was assigned and of difficulty with his supervisors and others in the office; that upon this complaint, Colonel Small recommended Johnson be assigned to another office and another supervisor; that when this was offered to Johnson, he refused it, saying let them (meaning the supervisor and others in the office) move, as he was going to stay where he was.

5. EEO Officer said after Johnson

had been reinstated in 1973, it was upon his recommendation that Johnson was promoted to a GS-11, but Johnson contends the EEO Officer would not assist him.

6. Though Johnson said others made derogatory remarks about him or blacks, he never produced a witness to corroborate his claim. On the contrary, numerous witnesses, including blacks, said such statements were not made.

7. Johnson complained that the rating panel acted improperly because it permitted information concerning Van Deren to be submitted. The facts establish that prior to the time for submitting applications for the position in question, Van Deren sent his updated information to Fort Eustis and Fort Monroe to be placed in his personnel folder. It was in the Personnel Office at Fort Eustis, but by some means had not been placed in his folder when the

folders were delivered to the rating panel. While the panel was in process of doing the ratings it became known the information was not in the folder. The Personnel Office sent the information to be put in the folder. No improper information was supplied nor any advantage given. The error was that of the Personnel Office in failing to place information timely received in the personnel folder.

8. Johnson says blacks were not allowed to participate in ISD training. The Chief of Staff of the Faculty and Development Division at Fort Eustis said that the TRI was the forerunner of ISD; that the TRI Workshop Program at Eustis did not start until November 1976; that prior to that time such training was given at Fort Lee, and that the Army only began the courses in early 1976.

Contrary to Johnson's complaints, Colonel Hannum testified that Johnson did receive the ISD training, and that all of the employees received it. He said he wanted everyone to take the course, but that Johnson was reluctant to attend. He remembered Johnson's being in class because Johnson went to sleep; that he passed the word down the line for them to jar Johnson's desk and awaken him. While Johnson says no blacks were given the training, Francine Perry (black) received her certificate showing she received the training in 1976, and it was clearly established that the early classes included blacks.

9. Though Johnson said he was qualified to fill any position at Fort Eustis, he was not supported in his evaluation of himself by a single witness, or by the record. His expert witness,

Freda Clark, who said she had agreed to assist Johnson and testify on a contingent basis--that is, she would be paid if Johnson recovered in the suit--said she made an evaluation of the qualifications of the applicants and she felt that Johnson was as well qualified as anyone. However, she never examined any of his work products or the writings which he did in his work assignments.

Johnson's work at Eustis was described thusly--

(a) Francine Perry, one of those chosen for the GS-12 position which Johnson sought, said she was a co-worker of Johnson from 1967 to about 1979; that she observed the quality of Johnson's work, as she was required to review it, and his writings were below the average; that his attendance was not the best; and she had often seen him

asleep at his desk.

(b) Johnson was observed asleep at his desk several times a week by witness Powers, who saw her supervisor wake him. She said Johnson contributed very little to the office. Lieutenant Colonel Hannum observed Johnson asleep in his class, and at his desk, because his supervisor took a picture of him.

(c) Johnson commenced his work under witness Cox. She said she was delighted when she read his summary of qualifications, but his writing was not good; there were errors in grammar, misspelling, and on one paper there were 18 comments; that his writing was below average; that she suggested he go to an English class, but he did not do so; that she had seen him asleep at his desk on more than 10 occasions; that she assisted him in every way that she could,

but that at his grade level he was supposed to be able to handle his work. She was asked by Johnson's counsel what errors had occurred and how she remembered the errors. She replied she remembered he left out a verb in a sentence, and she was shocked at it.

(d) Johnson complained that when he was reinstated in 1973, monitoring was done of him and his work. EEO Officer said it was done to assure he received proper treatment, and was not treated differently from others. This was confirmed by Thornton, the Personnel Officer who said that upon Johnson's reinstatement, it was directed he receive proper orientation, and that reports were that everything was all right.

Plaintiff's charges of discrimination are without factual support, as are his other contentions. The record is clear that there is no evidence of

discrimination in selection of the rating panels, nor is there any evidence of discrimination by the panels. The panel members were furnished with the rating criteria which they were to use and the records and information on the applicants. They were to be rated on their job related experience which met the criteria of the job they sought. As Colonel Montgomery said, they were furnished with the information on the candidates, and the qualifications required; that the information they were seeking was set forth in the folders given them. Though plaintiff says he was not given as high a rating as he felt he was entitled to, he points to no facts justifying a different rating than the one received. No one questioned his prior Army experience, or his training, or his college degrees, but the prior

training and experience did not meet the qualifying criteria for the position he sought.

Hill v. Western Electric, supra, makes it clear that an employer is "entitled to adopt selection standards based upon demonstrated ability, proper qualifications, experience and length of service to consider such things as job performance, willingness to accept responsibility and dependability." 596 F.2d 105.

The Court cannot substitute its judgment for that of the rating panels or of the selection officer. The issue here is not one of whether panels were constituted in strict compliance with regulations. The issue is, whether there was discrimination against plaintiff because of his race. Since the evidence fails to show any discrimination because

of plaintiff's race, the inquiry ends as there is no other basis for relief in this action. The complaint is therefore DISMISSED.

United States District Judge

Norfolk, Virginia

December 18, 1980.